90

(1)

No. _____

Supreme Court, U.S.
FILED
071290 APR 11 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LOUIS S. SADLER AND MARGARET A. SADLER,

Petitioners,

v.

CHESTER H. HINE AND LEEANN HINE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

PETITION FOR A WRIT OF CERTIORARI

LINDA HELEN BENNETT
Counsel of Record
L. HELEN BENNETT, P.C.
200 Lomas NW, Suite 850
Albuquerque, NM 87102
(505) 242-6300

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This was a civil action for money damages, based on Respondents' allegations that Petitioners committed acts of *prima facie* tort, fraud, negligent misrepresentation, innocent misrepresentation, and breach of contract in the course of the sale of a residential property in Albuquerque, New Mexico. Following a merits trial to the State District Court, the district court judge awarded, *inter alia*, more than $125,000 in compensatory damages and $250,000 in punitive damages against Respondents.

The questions presented are:

I.

WAS THE PUNITIVE DAMAGES AWARD UNCONSTITUTIONALLY EXCESSIVE, WHERE THE COMPENSATORY DAMAGES FULLY COMPENSATED RESPONDENTS FOR THEIR ECONOMIC INJURIES?

II.

DID THE PUNITIVE DAMAGES AWARD IMPERMISSIBLY PUNISH PETITIONERS FOR DEFENDING AGAINST RESPONDENTS' CLAIMS AGAINST THEM?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court and the New Mexico Supreme Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
COURSE OF PROCEEDINGS AND DISPOSITION BELOW	7
REASONS FOR GRANTING THE WRIT	9
WAS THE PUNITIVE DAMAGES AWARD UNCONSTITUTIONALLY EXCESSIVE, WHERE THE COMPENSATORY DAMAGES FULLY COMPENSATED RESPONDENTS FOR THEIR ECONOMIC INJURIES?	11
DID THE PUNITIVE DAMAGES AWARD IMPERMISSIBLY PUNISH PETITIONERS FOR DEFENDING AGAINST RESPONDENTS' CLAIMS AGAINST THEM?	17
CONCLUSION	18

TABLE OF CONTENTS – Continued

Page

APPENDICES

New Mexico Supreme Court Order, January 15, 2008 ..... App. 1

New Mexico Court of Appeals Memorandum Opinion, November 27, 2007 ..... App. 3

New Mexico Court of Appeals Notice: Proposed Summary Disposition, October 1, 2007 ..... App. 9

New Mexico Second Judicial District Court Judgment, June 7, 2007 ..... App. 17

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) 17

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) 10, 11, 16

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) 10

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) 10

Honda Motor Co. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) 10

Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) 11

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) 10, 13, 16

United States v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) 11

U.S. CIRCUIT COURT CASES

Kemp v. American Tel. & Tel. Co., 393 F.3d 1354 (C.A.11 (Ga.) 2004) 12

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES STATUTES

28 U.S.C.A. § 1257(a) 2

NEW MEXICO STATUTES

N.M.S.A. 1978, § 34-5-14 1

OTHER AUTHORITIES

U.S. CONSTITUTIONAL PROVISIONS

Amendment 1, U.S. Constitution 2, 17

Amendment 8, U.S. Constitution 3, 10

Amendment 14, U.S. Constitution 3, 10, 14

NEW MEXICO RULES

New Mexico Rules of Appellate Procedure, Rule 12-210(D), N.M.R.A. 8

New Mexico Rules of Appellate Procedure, Rule 12-502, N.M.R.A. 1

TREATISE AUTHORITY

Restatement (Second) of Torts § 908 (1977) 14

PETITION FOR A WRIT OF CERTIORARI

Louis S. Sadler and Margaret A. Sadler respectfully Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of New Mexico in this case.

OPINIONS BELOW

The unpublished Notice of Proposed Summary Disposition by the New Mexico Court of Appeals is reprinted in the Appendix (App.) at App. 9. The unpublished Memorandum Opinion of the New Mexico Court of Appeals is reprinted in the Appendix at App. 3. Petitioners petitioned the New Mexico Supreme Court in accordance with the New Mexico Rules of Appellate Procedure, Rule 12-502, N.M.R.A., and N.M.S.A. 1978, § 34-5-14, for a writ of certiorari to the New Mexico Court of Appeals. The New Mexico Supreme Court's Order denying Petitioners' Petition for Writ of Certiorari is reprinted in the Appendix at App. 1. No petitions for rehearing were filed in either the New Mexico Supreme Court or the New Mexico Court of Appeals.

JURISDICTION

The New Mexico Court of Appeals entered its Memorandum Opinion on November 27, 2007. No petition for rehearing was filed. The New Mexico Supreme Court entered its Order denying certiorari on January 15, 2008. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C.A. § 1257(a) (providing final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege, or immunity is claimed under the Constitution of the United States).

CONSTITUTIONAL PROVISIONS

Amendment I

Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VIII

Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Citizenship; Privileges And Immunities; Due Process; Equal Protection; . . .

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

RESPONDENTS Chester H. Hine and LeeAnn Hine (hereinafter "the Hines") brought a civil action for money damages against PETITIONERS Louis S. Sadler and Margaret A. Sadler (hereinafter "the Sadlers") in New Mexico State District Court, alleging that the Sadlers had engaged in *prima facie* tort,

fraud, negligent misrepresentation, innocent misrepresentation, and breach of contract in the course of the sale of a residential property in Albuquerque, New Mexico. The New Mexico State District Court dismissed the claim for *prima facie* tort, and the remaining issues were tried in a bench trial. The State District Court found for the Hines, awarding $125,611.12 in compensatory damages, plus costs and attorney fees, and punitive damages of $250,000.00.

The Sadlers built and lived in the residence at issue in this case for approximately 20 years before they put it on the market in 2003. The residence is located in the Sandia Heights neighborhood of Albuquerque, New Mexico, in an area surrounded by large, undeveloped, open fields, at the foot of the Sandia Mountains. During their lengthy ownership of the residence, the Sadlers were aware of mice having been in their home. They occasionally used preventative measures to prevent mice from entering or inhabiting the residence. However, the Sadlers did not feel that the home was "infested" with "pests."

The Sadlers executed a Property Disclosure Statement on July 13, 2003 and a Realtors Association of New Mexico standardized form "purchase agreement" on August 28, 2003. Mr. Sadler was a licensed real estate broker. The Disclosure Statement was incorporated into the Purchase Agreement by reference, and was a part of the sales contract between the parties. There was evidence that these forms were required in order for the property to be given a Master Listing Service (MLS) listing. The

Hines signed the Disclosure Statement and the Purchase Agreement, which also contained provisions notifying the Hines of the need to conduct their own inspections, on September 2, 2003. The Hines inspected and decided to purchase the residence. The closing was held October 8, 2003, and the Hines took possession of the house on October 15, 2003.

The Hines alleged and introduced evidence that, after they took possession of the house, they found evidence of a large and long-term infestation of mice. There was evidence to support the district court's finding that the infestation was extensive and long term. In the Disclosure Statement, the Sadlers had checked a box to indicate they were not aware of any past or present existence of any pests (i.e. termites, ants, wood destroying insects, mice, etc.) and that they were not aware of any past or present treatment for the eradication of any pests.

The Sadlers subsequently admitted in responses to Requests for Admission, in pre-trial correspondence, and in testimony at trial that they were aware of the presence of mice within the residence prior to its sale, and had been aware of mice in the residence during their occupancy. There was evidence that the residence at issue and other houses in the subdivision had experienced mice infiltrations, due to the proximity of open space. There was evidence that the Sadlers had taken steps to spray for mice and had left poison and deterrent devices out for mice. There was testimony that the Sadlers had seen mouse droppings

in cabinets on at least one occasion. There was evidence that the remains and residue were found throughout the house, and indicated a large infestation over a period of years.

There was no evidence or testimony that either the Hines or the Sadlers ever actually experienced any adverse health consequences as a result of the mice. Witnesses for both the Sadlers and the Hines testified that there was no odor or visible evidence of an infestation of mice in the house. The Sadlers indisputably had lived in the residence for many years before it was sold to the Hines.

In their Complaint, the Hines also alleged that the Sadlers fraudulently denied knowledge in the Seller's Disclosure Statement of carpet stains caused by urine from incontinent pets, and misrepresented the condition of the carpet. There was testimony that Mr. Sadler had verbally represented to the Hines that the carpet was in "new" condition. Upon being notified of the problems with the carpet, Mr. Sadler offered and arranged to have new carpet installed at no cost to the Hines, but the offer was not accepted. There was testimony and evidence that the Sadlers knew of problems with the incontinence of one of their older dogs. The Sadlers had installed new carpeting in 2002, and installed "top of the line" carpet padding at that time. There was evidence that – following the closing – the carpet was peeled back to reveal numerous large urine stains on the underside of the carpet throughout the house. Again, as with the testimony and evidence regarding the presence of

mice prior to closing, the consensus of the witnesses was that there was no olfactory or visual evidence of the urine stains.[1]

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Following the close of evidence, the State District Court rendered a decision in favor of the Hines. [App. 17] The State District Court's judgment was based on the court's determination that the Sadlers had fraudulently misrepresented the nonexistence of mice in the disclosure documents, breached the purchase agreement by failing to disclose the presence of mice, and misrepresented the condition of the carpet at the time of the sale. The court acknowledged that the Sadlers had made offers continuing through trial to replace the carpet. The district court held that the misrepresentations and breaches regarding the mice and the carpet were made with recklessness, if not malice, and with wanton disregard for the Hines' rights.

[1] The Hines alleged misrepresentations regarding drainage from spouts and gutters that allegedly damaged the house, and that a garage conversion was done in 1995 without the necessary permits, and that this was not disclosed. The district court rejected the claims regarding the alleged faulty drainage and leaks and rejected the claims for the alleged failure to obtain proper permits for the remodeling project.

The district court held the Hines were entitled to both compensatory and punitive damages under either the fraud or breach of contract theories. Judgment for the Hines and against the Sadlers was entered on June 7, 2007 for compensatory damages of $125,611.12, attorney fees of $66,463.25, punitive damages of $250,000.00, and costs of $33,386.46. [App. 18]

The Sadlers timely appealed to the New Mexico Court of Appeals. The State Court of Appeals' notice of proposed summary disposition[2] [App. 9] proposed to affirm the State District Court judgment. The Court of Appeals proposed to find that the determination that the Sadlers' testimony that they did not know about an infestation was "simply not credible," and that these considerations supported a finding of intentional deceit, was proper. [App. 11] The Court of Appeals also proposed that the amount of the punitive damages award was not excessive, considering the damages was "significant and easily detected" [App. 13], and where the economic harm posed health risks. [App. 13] Finally, the Court of Appeals compared the punitive damages award to penalties for criminal fraud under state criminal statutes. [App. 14]

---

[2] The New Mexico appellate courts provide for a summary disposition procedure, which was utilized by the Court of Appeals in this case. *See* Rule 12-210(D) N.M.R.A. (describing the procedure for disposition of appeals by the state appellate courts without full briefing of the issues raised on appeal).

The Sadlers filed a memorandum in opposition to the Court of Appeals' proposed summary disposition, but the Court of Appeals remained unpersuaded.

In its Memorandum Opinion [App. 3], the Court of Appeals rejected the Sadlers' argument that the acts of deceit and misrepresentation did not occur over a period of time, were not made in the context of a business practice or business setting involving unequal parties, but in the one time sale of a residential property. [App. 4] The Court of Appeals also rejected the Sadlers' argument that the checking of a box on a standardized form should not be the basis of a punitive damages award of twice the compensatory damage award, where the compensatory damages provided ample compensation for the actual damages suffered as a result of the fraud. [App. 4] Finally, the Court of Appeals disagreed with the Sadlers' contention that the award impermissibly punished the Sadlers for defending against the claims made, and was based upon speculative damages. [App. 7]

The Sadlers timely applied to the New Mexico Supreme Court for a Writ of Certiorari to the Court of Appeals, but the requested writ was denied on January 15, 2008. [App. 1]

REASONS FOR GRANTING THE WRIT

The Constitution imposes certain limits, in respect both to procedures for awarding punitive

damages and to amounts forbidden as "grossly excessive." *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) (requiring judicial review of the size of punitive awards); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 574-585, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (review must be *de novo*); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (excessiveness decision depends upon the reprehensibility of the defendant's conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and the difference between the award and sanctions "authorized or imposed in comparable cases"). Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decision-maker's caprice. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

The Fourteenth Amendment's Due Process Clause imposes substantive limits on the States' discretion, making the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and prohibiting States from imposing "grossly excessive" punishments on tortfeasors, *e.g.*, *Gore*, 517 U.S., at 562, 116 S.Ct. 1589. The cases in which such limits were enforced involved constitutional violations predicated on judicial determinations that the

punishments were grossly disproportional to the gravity of the offense. *E.g., United States v. Bajakajian*, 524 U.S. 321, 334, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998).

Whether a punitive damage award can be sustained under a Constitutional analysis is a matter of public concern and of differing opinions in federal and state courts. *De novo* review tends to unify precedent and stabilize the law and is applicable when passing on determinations of the constitutionality of punitive damages awards. *Ornelas v. United States*, 517 U.S. 690, 697-98, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Gore*, 517 U.S., at 587, 116 S.Ct. 1589.

I.

WAS THE PUNITIVE DAMAGES AWARD UNCONSTITUTIONALLY EXCESSIVE WHERE THE COMPENSATORY DAMAGES FULLY COMPENSATED RESPONDENTS FOR THEIR ECONOMIC INJURIES?

While an award of punitive damages can be sanctioned to meet the goal of punishing the Sadlers for their misrepresentations and deterring them and others similarly situated in the future, the punitive

damages award in this case overstates both the actual harm done and the proper remedy for that harm. This case did not involve repeated deceitful acts, targeting financially vulnerable persons. *Compare Kemp v. American Tel. & Tel. Co.*, 393 F.3d 1354, 1363 (C.A.11 (Ga.) 2004). This case concerned the Sadlers' mischaracterization of infestation in a disclosure on a standardized form, and their misrepresentation regarding the condition of the carpet, where they made continuing offers to replace the carpet upon being apprised of its true condition.

While the Sadlers acknowledge the decision to award punitive damages is supported by evidence, more modest punishment for the Sadlers' misrepresentation of the fact and extent of the infestation, and for misrepresentation about the condition of the carpet, would have satisfied the legitimate objectives of the district court in punishing the misrepresentations and preventing their re-occurrence by the Sadlers and others.

The district court's award of $250,000.00 in punitive damages to punish and deter bore no relation to the Hines' actual harm. The Hines were fully compensated by the $125,611.00 compensatory award. The compensatory damages do not represent a low compensatory damage award. The case at bar involved an arms length transaction between parties of relatively equal bargaining power. The misrepresentations regarding the mice infestation were made by making a check on a standardized form that also expressly stated the Hines should conduct their own

inspection and inquiry. A $250,000.00 punitive damages award for improperly refusing to characterize their home of 20 years as "infested" is unreasonable.

The district court expressly relied upon this Court's decision in *Campbell*, 538 U.S. 408, 123 S.Ct. 1513 to support a decision of twice the award of compensatory damages as punitive damages. *Campbell* held: "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." 538 U.S., at 423, 123 S.Ct. 1513. *Campbell* expressly noted that, when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. *Id.*, at 425, 123 S.Ct. 1513. *Campbell* cautioned that: "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.*, at 426, 123 S.Ct. 1513.

Like the plaintiffs in *Campbell*, the Hines were awarded complete compensation. *Id.*, at 425, 123 S.Ct. 1513. The harm arose from a transaction in the economic realm, not from a physical assault or trauma. *Id.*, at 425-26, 123 S.Ct. 1513. The district court noted there were no physical injuries, yet calculated an excessive punitive damages award based on speculation that there could have been physical injuries. An award of double the amount of compensatory damages based on the unrealized

potential for physical injury should be reversed as excessive.

The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. Elementary notions of fairness enshrined in constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose. Dispassionate consideration of the facts in this case show no basis for determining the Sadlers should have expected filling out a disclosure form incorrectly could yield a punitive damages award of $250,000.

The compensatory damages awarded to the Hines included such incidental damages as payment of the mortgage and utilities for the residence while they were not able to occupy it. Thus, the compensatory damages already included the district court's consideration that the Sadlers should pay all costs associated with their failure to disclose. The compensatory damages already functioned to punish and deter. *See* Restatement (Second) of Torts § 908, Comment c, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both"). The punitive damages award in this case is unreasonable and excessive because it

duplicates portions of the compensatory damage award. The district court made its punitive damages award based upon the court's passion, prejudice, and speculation regarding the potential for harm, rather than actual injury.

While the district court is the determiner of credibility, the infestation and urine stains were uniformly described to be "not obvious" to the Hines or the witnesses, yet the district court insisted that the pervasiveness meant their existence nonetheless had to have been well known to the Sadlers. It is unreasonable to base such a large punitive damages award on speculation that the tortfeasor "must have known" about it, though the testimony reveals no one else did. The misrepresentation regarding the presence of mice or pests – the consequences of which accounted for the bulk of the compensatory damages award – concerned the Sadlers' actions in checking a box on a standardized form, not an elaborate scheme to defraud. With regard to the carpet stains, the district court itself noted that the Sadlers made repeated offers to replace the carpet, continuing through trial. Therefore, punishment for misrepresenting the state of the carpet was improper, where the Sadlers had offered to compensate the Hines with brand new carpet.

To support a claim for punitive damages, an individual's conduct must not be merely tortious or wrongful, but must rise to the level of being outrageous. The Sadlers' conduct in this case – while found to be wrongful based on the evidence – falls short of

the standard necessary to support a $250,000 punitive damages award. Where the Sadlers bore the full consequences of the failure to disclose in the form of remediation to the Hines, additional punitive damages in an amount of twice the compensatory award is unreasonable. In this case, where compensatory damages are substantial, a lesser ratio, equal to compensatory damages reaches the outermost limit of the due process guarantee. *Campbell*, 538 U.S., at 425, 429, 123 S.Ct. 1513.

Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. *Id.*, at 425, 123 S.Ct. 1513. To pass muster, the punitive damages awarded for the potential harm suffered by the Hines must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice. *Id.* It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Gore*, 517 U.S., at 575, 116 S.Ct. 1589. The district court's award of double the already substantial compensatory award as punitive damages represents an improper award that violated the Sadlers' right to due process of law. *Campbell*, 538 U.S., at 417, 123 S.Ct. 1513 (noting that, to the extent a punitive damages award is grossly excessive, it

furthers no legitimate purpose and constitutes an arbitrary deprivation of property).

II.

DID THE PUNITIVE DAMAGES AWARD IMPERMISSIBLY PUNISH PETITIONERS FOR DEFENDING AGAINST RESPONDENTS' CLAIMS AGAINST THEM?

The district court's decision to award punitive damages appears to have been based, in part, on the finding that the Sadlers refused to take any responsibility for their misrepresentations concerning the presence of mice, which exposed the Hines to potentially fatal physical harm (evidence was adduced regarding the dangers of hanta virus and other vermin-borne diseases) and significant actual financial harm. This appears to reduce to the district court's belief that the Sadlers should not have defended the claims against them, but should have paid the Hines whatever amount they demanded to remediate the discovered infestation. The acts of a defendant in resisting a civil claim by resort to litigation in the court system are not sufficiently reckless, willful and wanton so as to merit punitive damages. The First Amendment's petition clause protects a citizen's right of access to governmental mechanisms for the redress of grievances, including the right of access to the courts for that purpose. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). Punishment of a defendant for exercising their right to due process in the

courts is arbitrary and capricious, and has no place in a punitive damages analysis.

The district court appeared to treat the Sadlers' position in and defense of this lawsuit as a basis for punitive damages. To the extent that the district court's punitive damages award punished the Sadlers for deciding to litigate the matter rather than settle before trial, without any evidence that the Sadlers declined reasonable pre-trial settlement offers or engaged in malicious, abusive litigation of the matter, the district court's award is unreasonable and should be reversed or ordered reduced to a reasonable sum.

CONCLUSION

For the foregoing reasons Petitioners respectfully request that this Court grant a Writ of Certiorari to the Supreme Court of the State of New Mexico.

Respectfully submitted,

LINDA HELEN BENNETT
L. HELEN BENNETT, P.C.
200 Lomas NW, Suite 850
Albuquerque, NM 87102
(505) 242-6300

Dated: April 11, 2008

THE SUPREME COURT OF THE STATE OF NEW MEXICO
January 15, 2008

NO. 30,812

CHESTER H. HINE AND LEEANN HINE,

Plaintiffs-Respondents,

v.

LOUIS S. SANDLER [sic] **AND MARGARET A. SADLER,**

Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 27840.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New

Mexico, and the seal of said Court this 15th day of January, 2008.

(SEAL) /s/ Madeline Garcia
Madeline Garcia,
Chief Deputy Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CHESTER AND LEE ANN HINE,

Plaintiffs-Appellees,

v. **NO. 27,840**

LOUIS AND MARGARET SADLER,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Clay Campbell, District Judge

Chappell Law Firm
Bill Chappell Jr.
Michael Hoeferkamp
Albuquerque, NM

for Appellees

L. Helen Bennett
Albuquerque, NM

for Appellants

MEMORANDUM OPINION

(Filed Nov. 27, 2007)

PICKARD, Judge.

Louis and Margaret Sadler appeal from the judgment assessing punitive damages against them, claiming that the punitive damage award was unconstitutionally excessive and impermissible. The notice of proposed disposition proposed to affirm both the

district court's decision to award punitive damages and the amount of the award. The Sadlers filed their memorandum in opposition, and the Hines filed their memorandum in support of the proposed disposition. We were not persuaded by the Sadlers' arguments, and we therefore affirm.

The Sadlers continue to argue that the punitive damages award was unconstitutionally excessive and impermissible. The Sadlers rely on a case involving a nationwide insurer found to have acted in bad faith in defending one of its insureds, and they attempt to compare the reprehensibility of their conduct in determining whether punitive damages were warranted in this case. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 409 (2003). The Sadlers contend that in contrast to the facts in *Campbell,* they did not engage in a fraudulent scheme, repeated over a number of transactions, or concerning numerous vulnerable individuals. Therefore, the Sadlers assert that the total of $250,000 in punitive damages, representing two times the substantial compensatory damages awarded, is unconstitutionally excessive, particularly when viewed de novo, and in light of the facts in *Campbell.* [MIO 7]

Relying on *Campbell,* the Sadlers also contend that "the District Court apparently did not consider that the acts of misrepresentation occurred in this case, not in the context of a business practice or relationship, but in an arms length transaction involving the sale of residential real estate between persons of equal bargaining power." In particular,

they argue that a $250,000 punitive damages award for improperly characterizing a home that they themselves lived in for twenty years as "not infested" is unreasonable. [MIO 5] The Sadlers make much of the fact that a large punitive damage award was assessed against them based solely on checking a box on a standardized form. However, the form did not require knowledge of an "infestation," as they seem to assert. Rather, it merely inquired whether the Sadlers were aware of any past or present existence of pests, or the past or present treatment for the eradication of any pests. There was evidence that the Sadlers admitted they were aware of the presence of mice, had seen mouse droppings, and had taken steps to eradicate the mice by spraying, leaving poison, and leaving deterrent devices. [DS 4] Yet they indicated on the form that they were not aware of pests or the treatment for the eradication of pests. Numerous photographs showing the remains of mice, and residue from past attempts to treat the mice problem, were also admitted into evidence to support the Hines' misrepresentation claim. As a licensed real estate broker, Mr. Sadler was well aware of the requirement of making these types of disclosures. [RP 678] Considering the evidence, and totality of the circumstances, the Sadlers' conduct was no less reprehensible than if it were a corporate entity engaging in the same behavior.

Next, the Sadlers continue to argue that the punitive damage award impermissibly punished them for defending their claim. The Sadlers assert that the

district court's statement concerning the Sadlers' "refusal to take any responsibility for their misrepresentations concerning the presence of mice, which exposed . . . Plaintiffs to both potentially fatal physical harm and significant actual financial harm," both punished them for exercising their due process rights and reflected an improper consideration of speculative harm. [MIO 8, RP 679] The notice of disposition proposed to disagree with the Sadlers' contention that the statement could only be read mean to that the judge punished them for exercising their right to due process by not settling before trial. [MIO 8-9] The notice relied on facts found by the district court to support the reprehensibility of the conduct, which were not disputed by the Sadlers. *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law."). In addition, the judge's statement was in the context of discussing the reprehensibility of the conduct, including the Sadlers' lack of candor, false disclosures, and the nature of the wrongs. [RP 678] There is nothing in that discussion that leads this Court to believe the district court was punishing the Sadlers for defending their claim.

In arguing that there was an improper consideration of speculative harm, the Sadlers assert that there was no physical injury in this case and that the district court apparently ignored the fact that they too lived in the home they improperly characterized as

"not infested" and were also exposed to any potential dangers or health risks. [MIO 5, 6, 8] These assertions do not bolster their argument.

Given the abundant evidence of mice in the home, the fact that the Sadlers lived in the home for twenty years but still denied there was a mice problem is more reprehensible than if they had not resided there as it bore on their undisputed knowledge that they misrepresented. More importantly, the Sadlers do not dispute the proposition in *Aken v. Plains Electric Generation & Transmission Cooperative, Inc.*, 2002-NMSC-021, ¶ 20, 132 N.M. 401, 49 P.3d 662, that potential harm is in fact a proper consideration in assessing the relevant factors for a punitive damage award. Therefore, to the extent the Sadlers contend that the consideration of potential danger was not a proper consideration for punitive damages, we disagree. *See Hennessy*, 1998-NMCA-036, ¶ 24.

Finally, we do not determine the district court's compensatory damage award to be excessive as a matter of law. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 49, 127 N.M. 47, 976 P.2d 999 (stating that excessiveness of compensatory award determined as a matter of law). The Sadlers cite *Allen v. Allen Title Co.*, 77 N.M. 796, 798, 427 P.2d 673, 675 (1967), for the contention that a party whose contract has been breached is not entitled to be placed in a better position because of the breach than he would have been in had the contract been performed. The fact that the Sadlers [sic] chose to do the work

themselves is not relevant to the amount they were entitled to in order to make them whole. *See Cent. Sec. & Alarm Co. v. Mehler,* 1996-NMCA-060, ¶ 11, 121 N.M. 840, 918 P.2d 1340 ("The purpose of compensatory damages is to make the injured party whole by compensating it for losses."). Compensating the Sadlers [sic] in the amount they would have to pay a professional to complete the work is not placing them in a better position. Therefore, to the extent the Sadlers ask for a reduction of $13,200 in compensatory damages, we decline their request. [MIO 10]

For all these reasons, and those stated in the notice of proposed disposition, we affirm.

IT IS SO ORDERED.

/s/ Lynn Pickard
LYNN PICKARD, Judge

WE CONCUR:

/s/ Celia Foy Castillo
CELIA FOY CASTILLO, Judge

/s/ Michael E. Vigil
MICHAEL E. VIGIL, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CHESTER AND LEE ANN HINE,

Plaintiffs-Appellees,

vs.

No. 27,840
Bernalillo County
CV-05-3595

LOUIS AND MARGARET SADLER,

Defendants-Appellants.

NOTICE
PROPOSED SUMMARY DISPOSITION

(Filed Oct. 1, 2007)

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **August 30, 2007.**

This case has been assigned to the **SUMMARY CALENDAR** pursuant to Rule 12-210(D) NMRA.

Summary affirmance is proposed.

Note: This is a ***proposal*** of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition should or should not be made.

See Rule 12-210(D) NMRA.

Issue 1: Louis and Margaret Sadler argue that the punitive damages award was unconstitutionally impermissible. The Sadlers assert that the district court's decision to award punitive damages appears to have been based, in part, on the Sadlers' "refusal to take any responsibility for their misrepresentations concerning the presence of mice, which exposed Plaintiffs to both potentially fatal physical harm and significant actual financial harm." [DS 10] The Sadlers contend that the district court erroneously punished the Sadlers for deciding to litigate the action against them rather than settle before trial. The Sadlers state that punishing them for exercising their right to due process is arbitrary and capricious, and has no place in a punitive damages analysis. [DS 10-11]

Initially, we note that the docketing statement does not contain a citation to the record, and we cannot determine whether the quotation relied upon by the Sadlers was an oral comment from the trial judge. Nevertheless, we propose to conclude that the district court's determination is consistent with the law and supported by the findings of fact. *See Ledbetter v. Webb,* 103 N.M. 597, 604, 711 P.2d 874, 881 (1985) (stating that the trial court's verbal comments can be used to clarify a finding, but not to reverse a finding). The district court found that "Defendant Sadlers' testimony on lack of knowledge of the existence of an [sic] treatment for the eradication of

mice was simply not credible, and these same considerations support a finding of intentional deceit." [RP 807] This finding is consistent with the determination that failure to take responsibility for their conduct at trial, by giving testimony that conflicted with their discovery, constituted reprehensible behavior, which is one of the relevant factors in analyzing a punitive damage award. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶ 20, 132 N.M. 401 49 P.3d 662.

Issue 2: The Sadlers also contend that the punitive damage award was unconstitutionally excessive. "While the Sadlers acknowledge the decision to award punitive damages is supported by evidence, a more modest punishment for the Sadlers' misrepresentation of the fact and extent of the infestation, and for misrepresentation about the condition of the carpet could have satisfied the legitimate objectives of the district court in punishing the misrepresentations and preventing their re-occurrence by the Sadlers and others." [DS 6] We review the question of excessiveness de novo. *Id.* ¶ 15. "Under de novo review, we are to make an independent assessment of the record." *Id.* ¶ 19. In so doing, we must bear in mind the relevant factors and determine whether the award of punitive damages is comparatively reasonable. *Id.* Any doubt should be resolved in favor of the trial court's determination. *Id.*

The relevant factors in analyzing a punitive damages award are: "1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the

harm (or potential harm) suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* ¶ 20.

Assessing the degree of reprehensibility of the Sadlers' misconduct "requires comparing damages to the enormity of the defendant's wrong, apart from the injury actually sustained." *Id.* ¶ 23. We note that "trickery and deceit are considered more reprehensible than mere negligence." *Id.* ¶ 21 (internal quotations and citation omitted). The trial court found that "[b]ased on their demeanor at trial, the totality of the evidence contradicting the Sadlers' denials and attempted qualifications of their discovery admissions, the pervasiveness of the infestation discovered just weeks after closing, along with the incredulity of Mr. Sadler's logic when he attempted to maintain, to justify and to reconcile each of the conflicting statements, Defendant Sadlers' testimony on lack of knowledge of the existence of and treatment for the eradication of mice was simply not credible, and these same considerations support a finding of intentional deceit." [RP 807, fof 20] The Sadlers do not dispute that there was substantial evidence to support this finding. The Sadlers displayed a heightened attitude of deceit and denial, which supports a punitive damage award. Therefore, we propose to conclude that a substantial award was needed to meet the purpose of punishing the Sadlers, and others similarly situated, for their conduct.

The second factor is the "'ratio [of punitive damages] to the actual harm inflicted on the plaintiff.'" *Id.* ¶ 23 (Citation omitted). "The test under the second guidepost in New Mexico is that "'[t]he amount of an award of punitive damages must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice.'" *Id.* ¶ 23. Imposing "a maximum ratio of ten to one for *economic* injury cases" is proper "where the damage is significant and *easily detected*." *Id.* ¶ 24 (emphasis in original). "[I]n a case involving injuries to health or safety, the ratio 'might be much higher. . . .'" *Id.* (Citation omitted). The Sadlers' deceitful conduct, coupled with their refusal to take responsibility, after fully admitting their knowledge of the problems, caused economic harm that was easily detected and calculated, but also posed health risks. [RP 808, fof 25] Potential harm is a proper consideration in assessing the relevant factors for a punitive damage award, *Id.* ¶ 20. Therefore, we propose to conclude that a ratio of two to one, punitive to actual damages, does not constitute an unreasonable or excessive award.

The last factor is "'[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.'" *Id.* ¶ 25. "[T]he comparable sanctions factor is the least important indicium," in part, because there is often not any comparable statute concerning the proper punishment for the conduct involved. *Id.* The Sadlers do not provide authority for comparable civil

or criminal penalties, *See In re Adoption of Doe,* 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating that an appellate court will not consider an issue if no authority is cited in support of the issue). The closest comparable crime is criminal fraud, although we acknowledge the elements are slightly different in that it requires fraud involving property belonging to someone other than the defendant. UJI 14-1640 NMRA. Criminal fraud is a second degree crime for property valued over twenty thousand dollars ($20,000), and carries a penalty of up to nine years imprisonment. *See* NMSA 1978, § 30-16-6 (1987) (defining criminal fraud); NMSA 1978, §31-18-15(A)(3) (1999) (providing sentencing authority for non-capital felony crimes). *Aken* recognized that "[t]he possibility of a jail sentence justifies a substantial punitive damages award." *Aken,* 2002-NMSC-021, ¶ 27. Therefore, under the third factor, we propose to conclude that the punitive damage award was not excessive.

Applying the relevant factors to the trial court's findings, which are not disputed by the Sadlers, we propose to hold that the trial court's punitive damage award was based on the law and did not "'plainly manifest passion and prejudice rather than reason or justice,'" as suggested by the Sadlers. *Id.* ¶ 23 (citation omitted).

Issue 3: Finally, the Sadlers argue that the compensatory damages were improperly calculated. We will uphold a trial court's award of compensatory damages if supported by substantial evidence. *Chavarria v. Fleetwood Retail Corp.,* 2006-NMSC-046,

¶ 12, 140 N.M. 478, 143 P.3d 717. In addressing the excessiveness of the trial court's award, "the court does not weigh the evidence but determines the excessiveness as a matter of law.'" *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 49, 127 N.M. 47, 976 P.2d 999 (citation omitted).

Specifically, the Sadlers contend that the trial court erroneously provided wages for four workers, when there was evidence that only Mr. Hine and possibly another helper completed some of the work. Apparently the district court used the estimate provided by evidence from a restoration company, and then discounted the difference between that estimate, and an estimate of the work performed by Mr. Hine and his helper. The trial court reasoned that this calculation would reflect the difference between "work accomplished by a professional remediation service and work accomplished by fairly skilled home-improvement 'amateurs' working at a rate of $20.00 per hour." The trial court based its estimate on the difference between the estimate for the restoration company to complete the work, and the conjecture that four workers, as had worked for the remediation company, averaging twenty hours per week, would be paid to complete the work within a certain time. [DS 11]

It was not unreasonable for the trial court to conclude that had the work been done by remediation professionals, it would have taken four workers that amount of time to complete the necessary work. *See Cent. Sec. & Alarm Co. v. Mehler,* 1996-NMCA-060,

¶ 11, 121 N.M. 840, 918 P.2d 1340 ("The purpose of compensatory damages is to make the injured party whole by compensating it for losses."). Ultimately, "'[t]he amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and, in the final analysis, each case must be decided on its own facts and circumstances.'" *Coates,* 1999-NMSC-013, ¶ 49 (citation omitted). We propose to conclude that the trial court did not err in calculating its award of compensatory damages. *See Ledbetter v. Webb,* 103 N.M. 597, 604, 711 P.2d 874, 881 (1985) ("Precise mathematical computation is not required.").

For all of these reasons, we propose to affirm.

/s/ Lynn Pickard
LYNN PICKARD, Judge

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

CHESTER H. HINE
AND LEE ANN NINE,

Plaintiffs,

vs. Case No. CV-2005-03595

LOUIS S. SADLER AND
MARGARET A. SADLER,

Defendants.

JUDGMENT

(Filed Jun. 7, 2007)

THIS MATTER having come before Court for trial on the merits on January 2, through January 4, 2007, and further before the Court for a hearing on punitive damages on March 28, 2007, and the Court having heard the testimony of all witnesses, reviewed all exhibits, and having heard the arguments of counsel, and being otherwise fully advised in the premises, enters Judgment as follows:

1. Plaintiffs' claim for Prima Facie Tort is hereby dismissed with prejudice.

2. Plaintiffs' claims related to the water leak and faulty ventilation of the furnace are hereby dismissed with prejudice.

3. Judgment for compensatory damages in the amount of One Hundred Twenty-Five Thousand Six

Hundred Eleven and 12/100 Dollars ($125,611.12) is hereby entered in favor of the Plaintiffs against Defendants Louis S. Sadler and Margaret A. Sadler, jointly and severally, based upon willful breach of contract and fraudulent misrepresentation on the part of said Defendants.

4. Plaintiffs are hereby awarded attorney fees in the amount of $62,318.00 (including $1,500.00 for April), plus gross receipts tax in the amount of $4,145.25, totaling $66,463.25.

5. Plaintiffs are hereby awarded punitive damages, based upon the intentional and fraudulent misrepresentations by both Defendants and breach of the purchase agreement with recklessness and wanton disregard of Plaintiffs' rights by both Defendants, in the amount of Two Hundred Fifty Thousand and 00/100 dollars ($250,000.00). The punitive damages are assessed jointly and severally against both Louis S. Sadler and Margaret A. Sadler.

6. Plaintiffs have submitted a Cost Bill and Defendants have no objection and therefore costs are awarded to Plaintiffs in the amount of $33,386.46.

7. Plaintiffs are awarded pre-judgment interest from September 21, 2006 to January 19, 2007 in the amount of $4,129.68 ($125,611.12 x 10% x $^{120}/_{365}$).

8. Interest shall accrue on the Judgment at the rate of fifteen percent (15%) per annum commencing on January 19, 2007.

9. All further claims, if any, raised by the parties are hereby dismissed with prejudice.

/s/ Clay Campbell
HONORABLE CLAY CAMPBELL
DISTRICT COURT JUDGE

SUBMITTED BY:

CHAPPELL LAW FIRM, P.A.

By: /s/ Michael Hoeferkamp
Bill Chappell Jr., Esq.
Michael Hoeferkamp, Esq.
6001 Indian School Rd. NE, #150
Albuquerque, New Mexico 87110
(505) 878-9600
(505) 878-9696 – FAX
Attorneys for Plaintiffs

APPROVED AS TO FORM ONLY BY:

CALVERT MENICUCCI P.C.

By: see attached
Carl A. Calvert, Esq.
8900 Washington St., N.E., Suite A
Albuquerque, NM 87113
(505) 247-9100
(505) 247-9761 – FAX
Attorneys for Defendants

SUBMITTED BY:

CHAPPELL LAW FIRM, P.A.

By: _____

Bill Chappell Jr., Esq.
Michael Hoeferkamp, Esq.
6001 Indian School Rd. NE, #150
Albuquerque, New Mexico 87110
(505) 878-9600
(505) 878-9696 – FAX
Attorneys for Plaintiffs

APPROVED AS TO FORM:

CALVERT MENICUCCI P.C.

/s/ Carl A Calvert

By: Telephonic Approval on: [form only]

Carl A. Calvert, Esq.
8900 Washington St., N.E., Suite A
Albuquerque, NM 87113
(505) 247-9100
(505) 247-9761 – FAX
Attorneys for Defendants